lib.

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

LOVSTED & CO., INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 3065

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

x - - - - - - - - - - - - x

8/27/84

D E C I S I O N

This is an appeal from the decision of respondent Commissioner of Internal Revenue denying the request of petitioner Lovsted, for a refund of the amount of ₱36,086.00, representing alleged erroneously paid 25% advance sales taxes and 50% mark-up on thirty-four (34) cases of Prestcold Condensing Units and Searle Evaporators. (Industrial Refrigeration Machinery and Parts, Brochure, pp. 35-49, BIR rec.)

Petitioner is a corporation duly organized under the laws of the Republic of the Philippines. It has its principal office at Smith, Bell & Co., Inc., Km. 13, South Expressway, Parañaque, Metro Manila. It imported from the United States for resale in the Philippines, several units of industrial refrigeration equipment and spare parts which arrived on board the vessel "Arnold Mearsk" with Registry No. 2845, covered by Bill of Lading

No. NYCF 575 and under Entry No. 00323 on July 5, 1979.

Subsequently, in a letter dated January 2, 1979, headlined "Authority to Release Imported Goods" No. IT-79-0000066, (Exh. B, p. 6, CTA rec.), respondent Commissioner of Internal Revenue authorized the release of the imported merchandise from customs custody, subject to the payment of 25% advance sales tax and 50% mark-up, in accordance with Section 196 (i) and (m), in relation to Section 193(b) of the National Internal Revenue Code, as amended. Quoted below are the pertinent portions of said Section 196:

> SEC. 196. Percentage tax on sales of semi-essential articles. - There shall be levied, assessed, and collected only once on every original sales, barter, exchange, or similar transaction intended to transfer ownership of, or title to, the articles hereinbelow enumerated, a tax equivalent to twenty-five per centum of the gross selling price or gross value, in money of the articles so sold, bartered, exchanged or transferred, such tax to be paid by the manufacturers or producers:
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> xxx xxx xxx
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> xxx xxx xxx
>
> (i) beverage coolers, ice cream cabinets, water coolers, food and beverage storage cabinets, each having, or being particularly designated for use with a mechanical refrigerating unit operated by electricity, gas, kerosene or other means;
>
> xxx xxx xxx
>
> xxx xxx xxx
>
> (m) Similar or analogous article to those enumerated above, as determined by the Secretary

> of Finance upon recommendation of the Commissioner of Internal Revenue based on the inherent essentiality of the product."

As an aftermath of said authority to release goods, on which petitioner paid (Annex E, p. 15, CTA rec.) the higher rate of 25% advance sales tax as per Section 196(i) and (m) aforementioned, herein petitioner wrote a letter to respondent on January 5, 1979, requesting reconsideration and asserting therein that the imported merchandise (units and spare parts) are "xxx for installation of cold storage of fish, shrimp, meat and etc., and not suitable for air conditioning," and such being the case, the said imported articles should only be subject to 10% advance sales tax and 25% mark-up, in accordance with Section 193(b), in relation to Section 199 of the National Internal Revenue Code, as amended. The same request for reconsideration was later reiterated in another letter dated January 19, 1979, but the said requests for reconsideration were denied. Hence, this appeal.

The issues are (1) whether or not the imported articles are subject to a 25% and 50% mark-up or 10% advance sales tax and 25% mark-up; and (2) whether or not petitioner is entitled to a refund of the amount of ₱36,086.00, representing alleged erroneous payment of 25% advance sales tax and 50% mark-up.

In his Answer to the petition for review, respondent averred that "xxx the description and uses of subject imported refrigeration machines show that the so-called 'small walk-in cold storage for food' is actually a cooled refrigerator undoubtedly to be used for storing and keeping food and other items cool and, therefore, similar or analogous to 'food and beverage storage cabinets'" within the context of Section 196(i) and (m) in relation to Section 193(b) of the Tax Code, as amended by P.D. No. 1358, subject to the higher rate of tax at 25% advance sales tax and 50% mark-up.

As a consequence of the above position of the respondent, petitioner had paid an additional amount of ₱36,086.00 or 25% advance sales tax plus 50% mark-up on May 14, 1979. (Annex "E", p. 15, CTA rec.) However, shortly after, or on July 24, 1979, petitioner filed a claim for refund of said amount of ₱36,086.00, stating therein that the payment and collection thereof was erroneous and is not in accordance with law. It steadfastly clung to its belief that the questioned merchandise should be subject only to the lower rate of 10% advance sales tax and 25% mark-up, and it called respondent's attention to an earlier ruling dated August 9, 1973 of the then Commissioner of Internal Revenue Misael P. Vera(Exh. "K", p. 54, CTA rec., underlining ours.) quoted hereunder:

August 9, 1973

Mr. D. A. Montelibano
Executive Vice-President
Smith, Bell & Company, Inc.
P.O. Box 311, Manila

S i r :

This refers to your letter dated August 8, 1973, requesting confirmation that the importations of your corporations, namely: Commins Diesel Sales and Service Corporation of the Philippines; Smith, Bell & Company, Inc.,; and G. M. Lovsted & Co. (Phil), Inc. of Frigiking Carrier-Transicold, Krack, J & E Hall, Copeland, Sporland and Penn industrial refrigeration equipment and parts and accessories thereof are subject only to the 7% advance sales tax.

It is stated in your letter that the imported industrial refrigeration equipment are for installation in built-in truck refrigeration units, concrete warehouses, insulated containers and boxes or insulated ships' holds of your clients who are engaged in shrimp, and fish processing for export, frozen food manufacturers, frozen chicken producers, supermarket cold storage, fishing boats, etc.

In reply, I have the honor to inform you that considering the foregoing nature and uses of the industrial refrigerators imported by your above-named corporations and our appreciation of the brochures submitted, said importations of industrial refrigerators together with parts and accessories thereof by your aforenamed corporations are subject to the 7% advance sales tax based on the landed cost thereof plus 25% mark-up, pursuant to Section 183(b) in relation to Section 186, both of the Tax Code.

Very truly yours,

MISAEL P. VERA
Commissioner of Internal Revenue
TAN 1601-593-5

To illucidate further on the significance of the above ruling to the case at hand, is the following explanation of petitioner to the present rate of 10% from the original 7%, which petitioner now believes as the only correct rate upon which a more judicious assessment of the goods should be made:

> A look-back of the history of Section 199 of the Tax Code, as amended, will lead us to conclude that the law making body or the taxing authority themselves have intended to tax these equipments at the rate of 10% advance sales tax and 25% mark-up as provided for in Sections 199 in relation to 193(b) and not 25% advance sales tax and 50% mark-up under Section 196(i) in relation to 193(b) thereof.
>
> It must be noted that before the enactment of P.D. 1358, the provision covering the "Percentage Tax on Sales of Other Articles" was Section 186 of the Tax Code providing for a rate of 7%. Upon the enactment of P.D. 1358, Section 186 of the Tax Code was amended and became Section 199 thereof providing the tax rate of 10%. Substantially, <u>the amendment was on the increase of the tax rate from 7% to 10%.</u>
>
> P.D. 1358, likewise, amended all other sales tax provisions enumerating therein additional articles or products covered by the various rates provided for in the amended provisions which are now Sections 194, 195, 196, 197, 198 and 201 of the Tax Code, as amended. <u>Yet in all these amendments, even in the previous sales tax provisions, commercial and/or industrial refrigeration equipment units were not among those enumerated therein.</u> The intention, therefore, is clear and indubitable - that these articles are to be taxed under Section 199, "Percentage tax on other semi-essential articles."
>
> The intent to tax the articles in question under Section 199 not under Section 196 or other

> Sections of the Tax Code, as amended, becomes more apparent when we take cognizance of respondent's ruling, dated August 9, 1973, specifically stating therein that herein petitioner's imported refrigeration equipment and parts are subject only to 7% advance sales tax pursuant to Section 183(b) (now Section 193(b) in relation to Section 186 (now Section 199) of the Tax Code, as amended. (Underlining ours.)

> Petitioner then proceeded to state that:

> According to the weight of authority, and surely the better view, the court may consider the general history of a statute, including its derivation xxx" (Penn. Mutual Life Ins. Co. v. Lederer, 252 U.S. 323, 64 L. Ed. 698, 40 S. Ct. 397; Kelly v. Dewey, 111 Conn, 201, 149, p. 382 Statutory Construction, Crawford)

Contrarily, respondent avers that, merchandise in question consisting of refrigeration equipment and parts are similar or analogous to those enumerated under Section 196(i) and (m) of the Tax Code, as amended. To disprove this point, in one of the hearings in this court, an affidavit was presented and on which the witness testified on the basic difference between the commercial refrigeration equipment and the household refrigerator/freezer/ cooler, (pp. 17-19, tsn, Oct. 9, 1981) thus:

> Q. In this affidavit there is a caption of "Basic Differences Between Commercial Refrigeration Equipment and Household Freezer/Refrigerator/Cooler. Are there x x x?

> A. Yes.

> Q. Will you please read the difference of what is stated there x x x?

> A. Well, a household refrigerator unit is self-contained one wherein you can just

plug it on. It is completely built. The ranges of horsepower is between 1/6 to 1/4. The condensers are finned serpentine coil without any fan. There is no receiver and the evaporators are printed plates with bare pipe coil. x x x.

xxx xxx xxx

A. x x x They are portable. They do not need maintenance people and they are mostly single phase unit; and they are generally cabinet type package.

Q. How about this one?

A. The commercial type units are the ones you can see in the supermarkets, hotels, restaurants. Example of these are display cases where you can see in the supermarkets; x x x Actually, you can go inside the room. x x x The type of unit is split type. Actually they are not pre-assembled. x x x.

xxx xxx xxx

A. Yes, they are installed on sight. The ranges of horsepower is 1/3 horsepower to 100. The condensers are finned coil with fan motors. The expansion valves are thermally actuated. The units are fixed and cannot be transferred or moved. Mostly, they are three-phase-voltage requirement. x x x." (Underscoring supplied.)

Meanwhile, on cross-examination by respondent Commissioner of Internal Revenue, the witness further testified (pp. 3-4, tsn, Dec. 3, 1981) to wit:

Q. Mr. Pangilinan, in the previous hearing you tried to differentiate the different types of refrigeration units. Could you possibly describe to us how this refrigeration machine looks like?

A. Usually, the household type is something like cabinet wherein you could store food while those in commercial types they are like chiller rooms. You can enter the room. They are the display cases, x x x

Q. The purpose of this, I understand, is to keep the food and other food items cold and frozen?

A. Yes. (Emphasis Supplied.)

From the above, it would seem, therefore, that through the years from 1973, when the first ruling on the applicable tax rate to the questioned merchandise (commercial refrigeration equipment and spare parts), came out, to the present, the taxing authority has not, in the least, bothered to make a positive change in the rate of tax applicable to the goods in question. It is also noted that in certain recently amended sections of the Tax Code which enumerate goods subject to higher rates of tax, the items or goods which are newly inserted therein do not include any of the goods in question in the instant case. Expressio unius est exclusio alterius. The mention of one thing implies the exclusion of all others not mentioned. (Dela Rosa vs. Revita Santos, 10 Phil. 148, 149; Misael P. Vera vs. Hon. Jose F. Fernandez, 89 SCRA 199, 203; Phil. International Fair, Inc. vs. Coll. of Int. Rev., 114 SCRA 710, 717.)

In recapitulation, the Court may now safely conclude that respondent's position that Section 196(i) and (m) correctly apply to the products in controversy is erroneous. We are in no position, or without justifiable reason, to depart from the ruling dated August 9, 1973, (Exh. "K", _supra_) of the then Commissioner of Internal Revenue Misael P. Vera that said articles are subject to the lower rate of 10% advance sales tax (then only 7% advance sales tax), plus 25% mark-up. The payment of the 25% advance sales tax plus 50% mark-up in the sum of ₱36,086.00 is erroneous and, therefore, refundable to petitioner Lovsted & Co., Inc.

WHEREFORE, respondent is hereby ordered to grant tax credit or refund to petitioner the amount of ₱36,086.00 which it paid on May 14, 1979 corresponding to the erroneously paid 25% advance sales tax, plus 50% mark-up on the imported Prestcold Condensing Units and Searle Evaporators. No pronouncement as to interests and costs.

SO ORDERED.

Quezon City, Metro Manila, August 27, 1984.

CONSTANTE C. ROAQUIN
Associate Judge

WE CONCUR:

AMANTE FILLER
Presiding Judge

ALEX Z. REYES
Associate Judge